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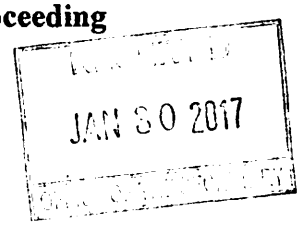
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY, and ROBERT C. HUBBARD, IV,** **Respondents.**

Administrative Proceeding
File No. 3-16554



RESPONDENTS' OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION IN LIMINE TO STRIKE RESPONDENTS' EXPERT (JELLUM) REPORT AND TO PRECLUDE HER FROM FURTHER TESTIMONY

Terry R. Weiss
Stefanie Wayco
Greenberg Traurig, LLP
3333 Piedmont Road, NE
Terminus 200, Suite 2500
Atlanta, Georgia 30305
Telephone: (678) 553-2603
Facsimile: (678) 553-2604
E-mail: weisstr@gtlaw.com
Email: waycos@gtlaw.com

-and-

George D. Sullivan
Greenberg Traurig, LLP
MetLife Building
200 Park Avenue
New York, NY 10166
Telephone: (212) 801-6541
Facsimile: (212) 801-6400
E-mail: sullivang@gtlaw.com

Attorneys for Respondents

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Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV ("Respondents") respectfully submit this brief in opposition to the Division of Enforcement's motion in limine to strike the expert report that Professor Linda D. Jellum has submitted on behalf of Respondents ("Jellum Report") and to preclude Professor Jellum from further testimony.

PRELIMINARY STATEMENT

Any party proposing to present expert testimony that purports to interpret the federal securities laws and opine on the ultimate issue of a case should expect the ALJ to either give the testimony little weight or refuse to consider it altogether. Such testimony would likely be viewed by the court as not particularly helpful or necessary, that is, the testimony would not be relevant.

The Jellum Report and Professor Jellum's anticipated testimony could not be more unlike that scenario. Although federal securities claims are being asserted in this case, the statute at issue, and the one that Professor Jellum interprets, is a new Georgia pension law entitled "Eligible Large Retirement Systems Authorized to Invest in Certain Alternative Investments" and referred to herein as the "New Georgia Pension Law." The New Georgia Pension Law gives Georgia-based public pension funds the right to make alternative investments.

Each pension fund board is responsible for ensuring compliance with the New Georgia Pension Law as it affects that particular pension fund. No Georgia-based authority has publicly claimed that any Georgia pension board has acted improperly in making alternative investments under the New Georgia Pension Law, and the publicly available minutes of the various board meetings do not reflect any such concern.

The New Georgia Pension Law is the first of its kind in Georgia, and it is completely different from the pension laws that have been enacted in other states. Indeed, it is unique in every respect and not necessarily in a way that benefits pensioners, the pension funds or the pension boards. As Professor Jellum points out, its many ambiguities create serious interpretative problems, particularly where the alternative investment at issue involves, as it does in this case, a fund of funds. The law also contains many undefined terms and terms that are used differently in different parts of the statute. In short, the New Georgia Pension Law is a confusing statute that is susceptible of multiple interpretations, some of which make more sense than others. No meaningful recorded legislative history exists to aid in interpretation, and, given the statute's uniqueness, case law and commentary interpreting other states' pension statutes is also of no help.

Professor Jellum is a leading expert in statutory construction in general and on the New Georgia Pension Law in particular. Regarding the latter, Professor Jellum avers that she has spent over 125 hours interpreting and construing the New Georgia Pension Law. *See* Affidavit of Linda D. Jellum ("Jellum Affidavit"), submitted herewith. Professor Jellum is unbiased and gains nothing whether this Court agrees or disagrees with her opinions. As she states in her Affidavit, her opinions would be the same regardless of who hired her because her conclusions rest on generally accepted statutory construction techniques.

To the best of our knowledge, this will be the first time any court has been asked to interpret the New Georgia Pension Law, and the stakes could not be higher, both for Respondents and for the Georgia-based public pension funds whose sizable alternative investments the Division argues are illegal under the New Georgia Pension Law, and potentially every other Georgia-based pension that has made alternative investments. Given the

interpretative challenges this new law presents and the importance of the issue to all concerned, the Court should accept Professor Jellum's offer of assistance and deny the Division's motion to strike.

Finally, separate and apart from her opinions concerning the New Georgia Pension Law, Professor Jellum also opines as to the constitutionality of the SEC ALJ's appointment and removal process. Respondents are aware that the Commission has rejected similar Appointments Clause violation arguments that they have advanced in this case. The Circuits, however, are split on the issue. That being so, the Court may find it helpful to review the academic commentary on that subject, and Professor Jellum supplies that. Her analysis and opinions on the constitutional questions is therefore, relevant from that perspective.

ARGUMENT

I. PROFESSOR JELLUM'S REPORT AND TESTIMONY ARE RELEVANT (AND, THUS, ADMISSIBLE) BECAUSE THEY WILL ASSIST THE COURT IN INTERPRETING THE NEW GEORGIA PENSION LAW

Under SEC Rule of Practice ("ROP") 320, all "relevant" evidence is admissible. ROP 320's concept of "relevance" is "much broader than that concept under the Federal Rules of Evidence." *In re City of Anaheim, et al.,* SEC Release No. 34-42140, 1999 WL 1034489, at *2 (Nov. 16, 1999). This is because:

> The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications. Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries. Our law judges should be inclusive in making evidentiary determinations.

Id.; see also Charles P. Lawrence, SEC Release No. 8213, 1967 WL 86382, at * 4 (Dec. 19, 1967) ("[A]ll evidence which 'can conceivably throw any light upon the controversy' should normally be admitted. That such evidence might be excluded in a jury trial does not preclude or

militate against its admission in a proceeding where it is not weighed by a jury, which could be unduly influenced, but by a hearing examiner who is legally trained and judicially oriented.") (citing *Samuel H. Moss, Inc. v. F.T.C.*, 148 F.2d 378, 380 (2d Cir. 1945), *cert. denied,* 326 U.S. 734 (1945)); *Opp Cotton Mills, Inc. v. Administrator,* 312 U.S. 126, 155 (1941) (exclusionary rules for jury trials are inapplicable to administrative proceedings); *cf. Cambridge Univ. Press v. Becker,* 2009 WL 7586776, at *2 (N.D. Ga. Sept. 3, 2009) (noting that a bench trial presents "no danger that the jury might give might give too much weight to the opinion of a legal expert").

A. Professor Jellum's Report and Testimony Will Help the Court Interpret What is at Best a Poorly-Drafted and Hopelessly Ambiguous Non-Securities State Statute

In 2010 and 2012, the Georgia legislature enacted statutes that, for the first time, allowed eligible Georgia public retirement systems to invest in "alternative investments."[1] To be clear: the New Georgia Pension Law regulates Georgia-based pensions; it does not regulate investment advisors or investment consultants in any way, including their business dealings with Georgia pensions. Although Georgia was the last state in the nation to allow its public pensions to invest in alternative investments, its statute resembles no other existing statute in any another state. Thus, although the Division has made the proper interpretation of the New Georgia Pension Law to be central to this case, reviewing case law interpreting other states' statutes will be of no benefit. Nor does the New Georgia Pension Law have any meaningful legislative history that could assist in statutory interpretation, as the Georgia Assembly maintains no committee reports or records of floor debates.

[1] Enacted in 2010, O.C.G.A. § 47-7-127 allows only the Firefighters' Pension Fund to invest in alternative investments. A virtually identical statute enacted two years later (O.C.G.A. § 47-20-87) expanded that ability to all large public retirement systems except the Teachers' Retirement System of Georgia. The earlier law was never repealed; however, reference herein will be to the later statute, O.C.G.A. § 47-20-87, *i.e.*, the New Georgia Pension Law.

Interpreting the New Georgia Pension Law in a way that comports with legislative intent requires special expertise that only a very few experts possess. Not only is it an unusually complex and technical statute, but it also contains lexical and structural ambiguity, redundancy, vagueness, silence, grammatical imprecision and uses the passive voice. For purposes of this case, these problems become the most serious when the limitations the New Georgia Pension Law places on the ability to invest in alternative funds are considered. How these limitations should be interpreted where, as here, the alternative investments are offered by a fund of funds (*e.g.*, GrayCo Alt. Partners II) is contested, with the Division being seemingly oblivious to the New Georgia Pension Law's many problems. Professor Jellum's insights, analysis and conclusions will be invaluable to the Court from both a substantive and a time-saving standpoint.

B. Professor Jellum's Report and Testimony Will Help the Court Understand Certain Words and Phrases That the New Georgia Pension Law Uses But Does Not Define

"[I]n securities cases, expert testimony is commonly admitted" to explain "complicated terms and concepts." *In re Robare Grp., Ltd.*, SEC Release No. APR-2271, 2015 WL 12734748, at *3 (Feb. 2, 2015) (Grimes, J.) (quoting *SEC v. Johnson*, 525 F. Supp. 2d 70, 77 (D.D.C. 2007)). Professor Jellum observes that the New Georgia Pension Law "contain[s] words and phrases that are not defined in the statute[] or any other directly applicable Georgia law. Moreover, the words and phrases have no ordinary meaning." Jellum Report at 10-11. In addition, when the New Georgia Pension Law "include[s] a word or phrase that has both a technical and ordinary meaning, the statute[] do[es] not identify which meaning was intended." *Id.* at 11. Professor Jellum identifies several such words and phrases to which the Court must attach a meaning in order to resolve this case. To give just one example (and Professor Jellum highlights many others), one provision of the New Georgia Pension Law limits a public pension

fund's total investment in an alternative investment to "20 percent of the aggregate amount of: [t]he capital to be invested in the applicable private pool, including all parallel pools, and other related investment vehicles established as part of the investment program of the applicable private pool." *See id.* at 23 (quoting O.C.G.A. § 47-20-87(c)(1)). In analyzing just this single provision, Professor Jellum, using generally accepted methods of statutory construction, carefully construes a number of words and phrases, including "applicable private pool," "parallel pools" and "investment vehicles." She does the same for every provision of the New Georgia Pension Law that is at issue in this case. Professor Jellum's opinions regarding these definitions will be helpful to the Court. Her report and testimony are, therefore, relevant and admissible. *See United States v. Cohen*, 518 F.2d 727, 737 (2d Cir. 1975) (in securities case, court did not abuse its discretion in admitting expert opinion on "the reach of the concepts of 'underwriter' and 'materiality'" because the opinion "was helpful to an understanding of the contested controversial issues requiring factual resolution...").

C. Professor Jellum Is Qualified to Give an Expert Opinion in This Case

The Division urges the Court to exclude Professor Jellum's expert report and testimony, arguing that her "submission does not reflect any previous experience with [the New Georgia Pension Law], or with the underlying business of pension fund investing generally." (Division Br. at 5.) As an initial matter, the Division's statement is incorrect. Professor Jellum (whose statutory construction experience and expertise is second to none) avers that she has spent 125 hours interpreting and construing the New Georgia Pension Law. *See* Jellum Affidavit ¶ 6. The amount of time spent and the depth of the analysis is obvious from the face of the Jellum Report. But even if the Division's stated concerns about her qualifications and testimony were correct, that would "go[] to the weight rather than admissibility of the evidence." *Burkhart v. Wash.*

Metro Area Transit Auth., 112 F.3d 1207, 1212 (D.C. Cir. 1997), *see also Baerman v. Reisinger*, 363 F.2d 309, 310 (D.C. Cir. 1966) ("The training and specialization of the witness goes to the weight rather than admissibility of the evidence, generally speaking."). Any concerns the Division may have regarding Professor Jellum's experience in particular areas can be addressed during cross-examination. *See, e.g., In the Matter of Paul Edward Lloyd, Jr.*, SEC Release No. 2416, 2015 WL 12752533, at *1 (ALJ, Mar. 12, 2015) (Foelak, J.) (declining to exclude expert legal opinion on relevance grounds because the Division could cross-examine the expert witness at the hearing).

D. The Cases That The Division Cites Are Inapposite

The Division asserts that "[t]he Commission has repeatedly held that expert testimony consisting of legal opinions is inadmissible." Division Br. at 3. The cases the Division cites, however, involve experts who proposed to interpret provisions of federal securities law in order to offer an opinion on the ultimate issue of the case; these include both cases reviewed by the Commission and cases brought by the Division in federal court. Not surprisingly, those experts were not permitted to testify because their opinions were directly within the court's area of expertise and, thus, not relevant. Those experts were simply "playing judge" on the very topics those judges presumably address every day. *See, e.g., In re IMS/CPSs & Assocs.*, SEC Release No. 8031, 2001 WL 1359521, at *10 (Nov. 5, 2001) (affirming administrative law judge's exclusion of expert testimony where expert was expected to testify that Form ADV was usually prepared without help of an attorney, did not have helpful instructions, and that respondents did not answer any of the Form ADV questions incorrectly); *In re Robert D. Potts*, SEC Release No. 39126, 1997 WL 690519, at *10 (Sept. 24, 1997) (affirming administrative law judge's exclusion of proposed expert testimony that the role and responsibilities of the concurring audit

partner have not been clearly defined by the Commission in case where issue in case was whether Respondent engaged in improper professional conduct when he concurred in his firm's issuance of unqualified audit opinions with respect to a client's financial statements); *In re Pagel, Inc.*, SEC Release No. 22280, 1985 WL 54837, at *5 (Aug. 1, 1985) (affirming administrative law judge's exclusion of expert testimony where expert witness attempted to opine on the ultimate issue in the case, whether respondents engaged in market manipulation); *In re Christiana Secs. Co.*, SEC Release No. 8615, 1974 WL 548387, at *7 n.38 (Dec. 13, 1974) (noting that legal questions related to proposed merger cannot be resolved by the opinions of financial experts and those experts "seem to have spent a great deal of time studying our decisions under Section 17 of the Act and pondering the implications of those decisions.").

In contrast, Professor Jellum's Report does not interpret federal securities law in order to opine on the ultimate issue in the case. Rather, Professor Jellum uses well-established rules of statutory construction to analyze the arcane and confusing New Georgia Pension Law, which is not a securities statute and has no connection whatsoever to the federal securities regulatory scheme or to the Georgia Securities Act.

Even if Professor Jellum's expert report and testimony was deemed a legal opinion, it is clear that legal opinions are not per se objectionable in a bench trial. *See In re Paul Edward "Ed" Lloyd, Jr.*, SEC Release No. 2416, 2015 WL 12752533, at *1 (ALJ, Mar. 12, 2015) (Foleak, J.) (admitting legal expert opinion on the operating agreements of Wyoming limited liability companies); *cf. Wells Fargo Bank N.A. v. Texas Grand Prairie Hotel Realty, LLC,* 710 F.3d 324, 329 (5th Cir. 2013) (finding *Daubert* safeguards are not as essential in a bench trial); *accord, David E. Watson, PC v. United States,* 668 F.3d 1008, 1015 (8th Cir. 2012); *United States v. Brown,* 415 F.3d 1257, 1269-70 (11th Cir. 2005). Although Professor Jellum offers

opinions on what constitutes a reasonable interpretation of the New Georgia Pension Law, a substantial portion of her opinion is devoted to explaining the law's many ambiguities. *See* Jellum Report at 6-10, 14-20. Professor Jellum's report and testimony are, thus, relevant under the standard established by the Commission (*see supra*) and will be helpful to the Court because it summarizes and explains the areas of confusion regarding the New Georgia Pension Law. *See In re City of Anaheim, et al.*, 1999 WL 1034489, at *2 (finding ROP 320's notion of "relevance" militates in favor of inclusiveness in making evidentiary determinations).

The Division also cites a number of federal court cases, claiming that "[t]he Commission's established view that expert witnesses should not offer legal opinions is consistent with the holdings of the federal courts." Division Br. at 4. In fact, the cases the Division cites do not endorse a *per se* exclusion of legal expert opinion, and they are all distinguishable from the instant scenario. For example, in *Burkhart,* the D.C. Circuit Court of Appeals did not exclude the proffered expert testimony merely because it was a purported "legal conclusion." Rather, it was excluded because it was not "otherwise admissible" under FED. R. CIV. P. 704(a), which provides that admissibility "depends, in part, on whether it will 'assist the trier of fact' in either 'understand[ing] the evidence or determin[ing] a fact in issue.'" 112 F.3d at 1212. In other words, the expert opinion testimony's admissibility was analyzed exclusively under the Federal Rules of Evidence, which do not apply here. *See In the Matter of City of Anaheim,* 1999 WL 1034489, at * 2 ("The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications."). Thus, *Burkhart* has no bearing on the admissibility of Professor Jellum's expert opinion. For the same reason, *United States v. Long*, 300 F. App'x 804, 815 (11th Cir. 2008), is also inapposite.

Likewise misplaced is the Division's reliance upon *In re Acceptance Ins. Cos. Secs. Litig.*, 423 F.3d 899 (8th Cir. 2005). In that case, the court did not exclude expert testimony solely because it was a purported legal conclusion but, rather, "because it was not supported by any methodology and not particularly helpful to the court." *Id.* at 905. The court found the expert testimony to be an inadmissible legal conclusion because it contained "no analytical reasoning or support." *Id.* Here, Professor Jellum relies upon generally accepted principles of statutory construction and provides a reliable basis for her opinions. *See* Jellum Report at 5-6; *see also* Jellum Affidavit, ¶¶ 8-14; *cf. SEC v. Sky Way Global*, LLC, No. 8:09-cv-455-T-23TBM, 2010 WL 5058509, at *4 (M.D. Fla. Dec. 6, 2010) (finding lawyer's expert testimony admissible and noting that, "[e]ven though [the lawyer's] opinion embraces an ultimate issue, to the extent that [his] opinion derives from a reliable basis . . . and assists the trier of fact . . . [the] opinion is admissible.").

Pinal Creek Grp. v. Newmont Mining Co., 352 F. Supp. 2d 1037 (D. Ariz. 2005), is similarly distinguishable. In that case, the court precluded an expert from offering an opinion regarding the law that governed the case and federal anti-trust law because his opinion was based on his interpretation of a leading legal decision and his application of case law to the facts of the case. *Id.* at 1046. Clearly, that opinion invaded the province of the court. Here, Professor Jellum is not interpreting case law (indeed, there is none to interpret), nor does she apply any (non-existent) case law to the facts of this case. *Id.* Rather, she has used generally accepted standards of statutory construction in order to assist the Court with the interpretation of a statute that lacks any legislative history and has never been construed or analyzed by any court.

Nor does *SEC v. Big Apple Consulting USA, Inc.*, No. 6:09-cv-1963-Orl-28GJK, 2011 WL 3753581 (M.D. Fla. Aug. 25, 2011), support the Division's arguments. In that case, the

court found the proffered expert opinion testimony would not be helpful to the jury because it would "merely tell the jury what result to reach." *Id.* at *6. That concern does not exist here because this case will be heard by the Court, not by a jury. *See, e.g., In the Matter of Morgan Stanley & Co.*, SEC Release No. 391, 1991 WL 417850, at * 1 (ALJ, June 13, 1991) (Murray, J.) ("[I]n the context of this non-jury administrative proceeding there is no need to make rulings which will protect the jury from receiving inappropriate legal opinions or advice.").

Finally, the Division cites several cases for the proposition that "federal courts also have determined that experts should not be permitted to offer their opinions on matters of public policy." Division Br. at 5. Again, that is not what the cited cases hold. In *Austin Firefighters Relief and Retirement Fund v. Brown*, 760 F. Supp. 2d 662 (S.D. Miss. 2010), the court did not categorically exclude expert opinion testimony on matters of public policy. Rather, it found, with no analysis, that the expert's testimony regarding whether a transaction was against public policy was an inadmissible legal conclusion. *Id.* at 671, n.3. In any event, federal courts' analyses regarding admissibility are inapplicable here. *See supra.* More to the point are the Commission's determinations, and the Commission has determined that expert evidence can, in fact, be helpful in making a public interest determination. *See In the Matter of Morgan Stanley & Co., Inc.*, SEC Release No. 391, 1991 WL 417850, at * 2 (ALJ, June 13, 1991) (Murray, J.) ("Expert evidence as to what was considered legally appropriate behavior, at the time and in these circumstances, would be relevant in making a public interest determination.").

Moreover, in the other cases the Division cites to support its "public policy" argument, the courts did not exclude expert opinion simply because it involved matters of public policy but, rather, because the testimony was felt to invade the province of the jury. *See Coral Way, LLC v. Jones*, No. 05-21934-CIV, 2006 U.S. Dist. LEXIS 97233, at *5 (S.D. Fla. Oct. 17, 2006)

(excluding expert testimony when the court could instruct the jury on the applicable law governing the action); *Godwin Gruber, P.C. v. Deuschle*, No. 3:00-cv-0017-L, 2002 U.S. Dist. LEXIS 14698, at *11 (N.D. Tex. Aug. 9, 2002) (excluding expert testimony because it "would invade and encroach upon the trial court's exclusive authority to instruct the jury on the applicable law."). As noted, such concerns do not arise in a non-jury case like this one.

II. PROFESSOR JELLUM'S OPINION REGARDING THE CONSTITUTIONALITY OF THE SEC ALJ'S APPOINTMENT AND REMOVAL PROCESS IS RELEVANT

Professor Jellum's opinion regarding the constitutionality of the SEC ALJ appointment process is relevant and, therefore, admissible. Professor Jellum opines that "the SEC's ALJ's appointment and removal processes violate the United States Constitution because the SEC ALJs are inferior officers who were not constitutionally appointed and are subject to unconstitutional dual for-cause removal limitation." *See* Jellum Report at 38. While Respondents recognize and respect the fact that the Commission has addressed the constitutionality of the ALJ appointment process, and as his Honor is undoubtedly aware, there is now a split in the Circuit Courts of Appeal on the issue. Given that, Professor Jellum's expert opinion provides an academic lens through which to view this issue, and it summarizes the current state of discourse on the topic. Given ROP 320's broad concept of "relevance" (*see In the Matter of City of Anaheim*, 1999 WL 1034489), Professor Jellum's report and testimony regarding the constitutionality of the ALJ appointment process are properly before the Court.

CONCLUSION

For all of the foregoing reasons, Respondents request that the Division's motion to strike the Jellum Report and to preclude her from further testimony be denied.

Respectfully submitted this 27th day of January, 2017.

Terry R. Weiss
Stefanie Wayco
Greenberg Traurig, LLP
3333 Piedmont Road, NE
Terminus 200, Suite 2500
Atlanta, Georgia 30305
Telephone: (678) 553-2603
Facsimile: (678) 553-2604
E-mail: weisstr@gtlaw.com
Email: waycos@gtlaw.com

-and-

George D. Sullivan
Greenberg Traurig, LLP
MetLife Building
200 Park Avenue
New York, NY 10166
Telephone: (212) 801-6541
Facsimile: (212) 801-6400
E-mail: sullivang@gtlaw.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned counsel for Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV hereby certifies that he has served a copy of the foregoing **RESPONDENTS' OPPOSITION TO DIVISION OF ENFORCEMENT'S MOTION IN LIMINE TO STRIKE RESPONDENTS' EXPERT (JELLUM) REPORT AND TO PRECLUDE HER FROM FURTHER TESTIMONY** by electronic mail and by United Parcel Service, addressed as follows:

Secretary Brent J. Fields
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Honorable Cameron Elliot
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Pat Huddleston II
William P. Hicks
Securities and Exchange Commission
Division of Enforcement
950 East Paces Ferry Road, Suite 900
Atlanta, Georgia 30326

This 27th day of January, 2017.

Terry R. Weiss